

REVIEW



Hong Kong Tort Law by Bryan S Bachner [Hong Kong: Longman, 1996. xxv + 204pp, paperback, HK\$225]

This is the second general textbook on Hong Kong tort law to appear in less than a year, following quickly on the heels of *The Law of Tort in Hong Kong* by Srivastava and Tennecone (reviewed (1996) 26 HKLJ 135). This fact is odd enough given that previously there had never been a comprehensive textbook treating Hong Kong's tort law and that nothing of note has happened in the legislative or judicial sphere to prompt this sudden activity. It is even more so when it is discovered that the authors of both publications are colleagues at the Department of Law, City University of Hong Kong. Whether this apparent overkill is by design or the result of poor intra-departmental co-ordination is not known. However, as both books purport to target the same readership and to be appropriate for use in university law courses, it is difficult to understand their relationship, or why the need for both. The price differential of \$675 may very well prove to be the key factor determining market share.

In terms of scope and content, Bachner's book is less ambitious than that of his colleagues. About one third of the size of the earlier work, the preface announces that 'only particularly relevant issues and cases were selected for discussion.' Unfortunately, the criteria for particular relevance are not given. Students are also asked to consult the 'other major tort law books emphasising English common law,' strange advice given the emphasis in this book on the leading English cases. In terms of coverage, the book is confined to a consideration of negligence and the related torts, with brief chapters on trespass and false characterisations. In terms of format and methodology, the emphasis is on cases. In fact, the book rather resembles a casebook, except that, rather than actually excerpting the cases, the law is explicated by means of potted summaries, with brief discussion following. For this reason, the book may appeal most to those looking for a quick fix, a fast route to the decision in a particular case. Moreover, the work rarely rises above the merely descriptive, and for the most part avoids the subtleties and contradictions in tort law in an effort to achieve an even, simple presentation.

The book begins rather oddly, with a chapter on the issue of duty of care in negligence. This is odd because there is no introductory chapter, no attempt to define negligence law or to set out its functions and objectives. There is a two-page general introduction preceding the book proper, but this by reason of its brevity does little more than identify the constitutional relevance of English tort law to Hong Kong, and distinguish tort law from contract and criminal law. There is no outline of the law of negligence, no discussion of its purposes, its place in the general law of tort, its various components, the relation one to the other of these components, the role of insurance, and the relationship of the

negligence tort with other compensation systems, in particular, the no-fault systems in force in Hong Kong. The reader is forced immediately into the difficult topic of duty of care and is somehow already taken to be familiar with negligence generally and the role of duty of care within that tort. This is regrettable given that the book is aimed primarily at a readership that is new to the study of tort law.

This problem may have resulted from another oddity, that the duty of care chapter was not written by the author, but was commissioned to one of his former colleagues, David Campbell. This was done, in the author's own words in his preface, 'in order to meet fast approaching deadlines,' and because duty of care is 'an issue which would be conceptually difficult to come to terms with even without time constraints.' A strange admission indeed (what hope then for the students?), with the unfortunate result that the reader has to wade through the next three chapters before he can hope to understand duty of care and its role in the tort of negligence, and then is largely left to his own devices in doing so.

Turning to the substantive aspects of the duty of care chapter, the writer makes an effort in places to engage in serious critical analysis, although this proves rather out of place given the more expository style of the remainder of the book. It is also in places written in language that is unclear (see the first paragraph of p 13) and cryptic (the writer's 'reservations' in footnote 17 are never identified). After setting out the 'traditional categories' approach and the modern 'neighbour principle' approach, the writer highlights the leading twentieth century cases and plots the developments leading up to the more restrictive 'incremental' approach adopted by the House of Lords in *Caparo v Dickman* [1990] 2 AC 605. What then follows is an argument, largely correct, it is submitted, that despite the recent posturing of the House of Lords, not much has really changed, that the law remains dominated by *Donoghue v Stevenson* [1932] AC 562 and that the incremental approach will at any rate not apply to existing duty situations but only where extensions of the duty of care are sought. The writer argues that even as regards the applicability of the incremental approach to new situations of duty of care, the substance of the House of Lords position is unsatisfactory, premised as it is on a misapprehension of the true plaintiff (often an insurance company), and false worries over floodgates concerns. Policy considerations will continue to be pivotal to the duty of care, and the duty will continue to be justiciable.

After this first chapter, the book reverts to a more expository approach in the hands of the main author. The change is noticeable and hurts the flow of the book. Although the second chapter continues on the duty of care theme, there is little connection with what was written in the first chapter. The second chapter is styled 'Economic Loss and Nervous Shock,' odd bedfellows which clearly belong in separate chapters. There is substantively little that brings the

two together, other than that the courts have been restrictive regarding both. These are like apples and oranges: the duty criterion for pure economic loss is a pre-existing close relationship of economic expectation between defendant and plaintiff, whereas in nervous shock what is of concern is not the relationship between plaintiff and defendant but a (family-like) relationship between the plaintiff and the physically injured victim of the defendant's tort.

Regarding the duty of care and pure economic loss, the author suggests four separate categories, and distinguishes between losses caused by negligent misstatement and losses caused by the negligent performance of a service. With respect, this distinction no longer holds (assuming that it ever did), in view of the recent House of Lords decisions in *Spring v Guardian Assurance* [1994] 3 All ER 129, *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506, and *White v Jones* [1995] 1 All ER 691. In all of these cases, the conduct of the plaintiff was more appropriately characterised as a service rather than as a statement, yet the same criteria of close proximity and reliance deriving from *Hedley Byrne v Heller* [1964] AC 465 were applied. This position is inevitable given that in many cases no substantively meaningful distinction can be made between a statement and a service, and at any rate many human activities could be described according to either terms. It is both surprising and regrettable that in treating this topic the author fails to take up and analyse the recent House of Lords decisions (*Spring* and *White* are merely footnoted), all of which had been rendered by the middle of 1995. The treatment of defective buildings is better, highlighting as it does the often forgotten Hong Kong decision of *Sunface v Meco* [1990] 2 HKLR 193, which correctly anticipated the House of Lords position in *Murphy v Brentwood* [1990] 2 All ER 908, that a defective house resulting from negligent construction or inspection is a pure economic loss.

The section on nervous shock turns immediately to the important House of Lords decisions in *McLoughlin v O'Brian* [1983] 1 AC 410 and *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310, which provide the current duty criteria of direct sensory perception of the accident and a close family relationship (or its equivalent) between plaintiff and primary accident victim. However, the coverage is descriptive, offering little critical analysis of this unsatisfactory state of the law. The Court of Appeal decision in *Page v Smith* [1994] 4 All ER 552 is also mentioned, but regrettably the House of Lords decision ([1995] 2 All ER 736) confirming a modification to the duty of care criteria for a plaintiff in the line of impact is not. The last case highlighted in this section, *Walker v Northumberland* (The Times, 24 November 1994) is unnecessary and out of place, as that case involved a bipartite relationship between employer and employee, a straightforward duty of care situation, rather than the problematic tripartite situation which has bedevilled the courts and which is the reason for the inclusion of this as a separate topic in the first place.

Unfortunately, a number of important issues in duty of care are never addressed, including the effect of a co-existing contract on the tort duty, the

special case of governmental authorities, and the question of duty of care for mere omissions (nonfeasance). Difficult choices must be made in a work of this nature, but a discussion of duty of care seems rather incomplete without some consideration of these issues.

The breach of duty chapter puts the central issue succinctly: the courts must mediate between the plaintiff's perspective, whether the activity of the defendant has been performed carelessly, and the defendant's perspective, whether the degree of risk in the defendant's activity must be tolerated by the plaintiff. The criteria, mainly economic in nature, used by the courts in determining the question of breach are set out by reference to the leading cases, and a rather quick summary of the more economically explicit American school of economic analysis is offered. However, coverage is again too descriptive, and the reader may mistakenly come away with the impression that this is a straightforward issue that presents little difficulty to the courts. As well, the variable standard of care as applied to certain categories, for instance that of children, or the infirm, is never addressed. No mention is made of the relevance and role of professional or legislative standards, or common practices. Somewhat shockingly, no mention is made of the leading cases of *Bolam v Friern* [1957] 2 All ER 118 and *Wong v Johnson Stokes & Master* [1984] 2 WLR 1, which set out the general rule regarding the importance of following the general practice, while demonstrating that no practice is immutable. In fact no Hong Kong cases are highlighted; this is surprising given the potential for differing standards across jurisdictions. Standard of care is after all governed by the conditions of the locale where the activity takes place.

The chapter on causation is obscure in places. After attempting to distinguish causation in fact and causation in law, the author confuses the issue by references to proximity, a concept relevant only to the duty of care issue. Proximity is not at all the same as proximate cause, a term often used by judges to refer to legal causation, in particular remoteness of damage. Moreover, the author wrongly cites *The Wagon Mound (No 2)* [1967] 1 AC 617 as a causation case, a case that, as the author's own discussion reveals, was actually decided on the issue of breach of duty. The discussion of *res ipsa loquitur* is misplaced — this is a breach of duty issue, and should have been included in the previous chapter.

The next chapter provides a consideration of the main defences of *volenti* and contributory negligence. These are adequately treated although again none of the important Hong Kong cases is highlighted. In the discussion of the leading case of *Pitts v Hunt* [1990] 3 All ER 344 no mention is made of the relevance to the decision of the English equivalent of s 12 of the Motor Vehicles Insurance (Third Party Risks) Ordinance, which by its terms prevented a finding of *volenti* in the driver/passenger relationship in *Pitts*. Nor is there any mention whatsoever of the third defence to negligence, that of *ex turpi causa*,

which was fully considered and applied by the court in *Pitts* and which was successfully argued in the Hong Kong decision of *Yim Tat-fai v AG* [1986] HKLR 873.

The succeeding chapters involve a consideration of the land based torts of trespass to land, occupier's liability, nuisance, and *Rylands v Fletcher*. Regarding trespass, the important decision in *Bernstein v Skyviews* [1978] QB 479 is considered, but the follow-up decision in *Anchor Brewhouse Developments v Berkley House (Docklands) Development Ltd* [1987] BLR 82 is omitted, which, in the case of fixed trespassing structures, provides an opposing rule to that in *Bernstein*. The chapter on occupier's liability is well organised and reads well, but a grievous error is committed when it is stated on p 79 that the Unfair Contract Terms Act 1984 preventing a business occupier from excluding liability for negligence is not applicable in Hong Kong. Analogous legislation with the same effect was in fact passed into law in Hong Kong in 1989 in the form of the Control of Exemption Clauses Ordinance. Nuisance and *Rylands v Fletcher* are also adequately treated given the limitations of a book of this nature.

The chapter on vicarious liability would be quite satisfactory, except for omissions of some key local case law. Although the Privy Council decision in *Lee Ting-sang v Chung Chi-keung* [1990] 2 AC 374 is concerned with an interpretation of 'employee' under the Employees' Compensation Ordinance, it is clear by its terms that it applies to the question of employee/employer generally, as it adopts the common law criteria. It is therefore the leading Hong Kong case on this question, yet it is entirely overlooked. Nor, in the section on car owner/driver, is the leading Hong Kong case of *Observatory Watch v Kwong Kwok* (1987) CA, Civ App No 77 of 1987 mentioned. The court here formulated the criteria for vicarious liability in this situation. Moreover, the law is misstated when the author writes that 'the owner of a car will normally be liable for damages that result from any accident that has been caused by a driver of the owner's car, if the owner has given permission to the driver to drive the car' (p 121). Quite the contrary! Mere permission is not enough - the driving must also be for the owner's purpose — as demonstrated in *Observatory Watch* and the leading case of *Morgans v Launchbury* [1973] AC 127, which also goes unmentioned here.

Although the liability of an employer to an employee is really nothing other than a species of the tort of negligence, it is correctly included here as a topic for separate consideration. The rules of liability are more refined, placing a greater duty on the employer, really one of nonfeasance, and is quite adequately treated, again given the limitations of a book of this nature. Brief reference is also made to the non-tortious, statutory obligation of the employer to provide compensation to injured workers under the Employees' Compensation Ordinance. This is a complex, much litigated area, the coverage here being very much confined to an overview.

The book continues with a certain thematic coherence, following the employer's liability chapter with that of breach of statutory duty. This action is not restricted to the employer/employee relationship but is most relevant there, as the current restrictive approach of the courts has all but eliminated its relevance elsewhere. Full consideration is given to this inherently contradictory action despite its diminishing importance in the general law. It is also good to see Hong Kong cases featuring more prominently in this section.

What then follows is a consideration of tort actions that are not negligence based. Battery, assault, and false imprisonment are criminal in nature but have a tort aspect in that they can attract an award of compensation. The main features are outlined with some reference to recent Hong Kong case law, including *Wong Kwai-fun v Li Fung* (1994) HCA No 5810 of 1986 and *Re Tran Quoc Cuong* [1991] 2 HKLR 312. Nonetheless, a number of important topics are omitted, such as the nature of the intention required, the rule of transferred intent as demonstrated in *Livingstone v Ministry of Defence* [1984] NI 356, and the controversy over the rule of remoteness of damage for trespass, as raised in the contradictory decisions in *Yeung For-kan* (1981) HCA 1254 of 1978 and *Wong Kwai-fun* (above). The tort action derived from the case of *Wilkinson v Downton* [1897] 2 QB 57 is included. However, the heading is styled 'intentional infliction of emotional distress,' unfortunately reinforcing the notion that the principle is limited to the facts of the *Wilkinson* case, as if not available to protect against actual physical injury. There is no discussion of the related tort of malicious prosecution.

Trespass to goods and conversion are taken up in the chapter on interference with goods. Trespass is a relatively straightforward issue, and is adequately distinguished from the more common action of conversion. Conversion is the more difficult tort, fraught with subtleties and contradictions, and a broad, descriptive outline is attempted through case summaries, including some from Hong Kong.

The book concludes with chapters on defamation and false characterisations. The chapter on false characterisations is really a catchall, bringing together the unrelated actions of deceit, malicious falsehood, and passing off, each of which is very cursorily addressed. The chapter on defamation is well organised, employing the standard breakdown of the tort into its three elements, complemented by its three common law defences. A plethora of Hong Kong case law is appropriately highlighted. However, important subtleties are again ignored, such as the difficulty in determining defamatory meaning in Hong Kong given that most defamatory statements are published in a language foreign to the presiding judge, and the fact that trials in Hong Kong are normally conducted without a jury (with one exception over the last eighty years), a peculiar feature of the Hong Kong system. The recent decision of *Cheung Ng-sheong Steven v Eastweek Publisher Ltd* [1995] 3 HKC 601, in which

the damages philosophy in Hong Kong was reworked, goes unmentioned. And there is only scant reference made to the provisions of the Defamation Ordinance.

Despite its limited objectives, this book, like its predecessor, appears to be the product of haste and publisher's pressure, with errors and inconsistencies too numerous to go unremarked. A few examples of the many errors will suffice: *Froom v Butcher* becomes *Froom v Butler* (p 60), 'difference' rendered as 'different' (p xxv), the first paragraph on p 1 repeats the word 'the,' 'stage' is rendered as 'state' (p 11), 'Litton J' becomes 'Laden J' (p 47). A somewhat greater irritation is to be found throughout chapter 1, where in summarising the holding in each of the leading duty of care cases the writer states that the 'court held that the defendant was negligent.' Quite wrong, as the defendants in those cases were merely found to owe a duty of care to the plaintiff in the circumstances of the case as presented in the preliminary issue of law. This is not mere nitpicking; the question of negligence is a separate issue and had not yet been considered by the court. It is also irritating to find the table of contents located awkwardly after the table of cases instead of at the beginning of the book, immediately following the preface. The reader must search through many pages in order to know the book's contents and where a particular topic can be found. These errors, seemingly minor in themselves, interrupt the book's flow, and give it a hurried, unpolished feel.

The book endeavours to cover only the major topics of tort law, doing so summarily, and so cannot be taken as a definitive or comprehensive tool. In addition to the omissions mentioned above, there is nothing on damages or injunction, on tortiously caused death and the legislation that permits its actionability, and on most of the no-fault mechanisms in force in Hong Kong. There is little in the way of theory, criticism, or calls for reform, and although Hong Kong case law takes a more prominent place than in the Srivastava book, there is really not much of a Hong Kong feel to it.

Having set out modest goals, this book certainly does not rise above them. And one may well wonder whether there is more danger in the book's chosen format than is justified by any merits it may have. The danger lies in the dependence by students on potted case summaries such as these, in substitution for the real thing. And worse, one is likely to come away with the impression that the law really is straightforward, devoid of controversy or contradiction.

*Richard Glofcheski**

* Lecturer, Department of Law, University of Hong Kong.